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Supreme Court, U.S.
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No. 99-1727

In The

Supreme Court of the United States

October Term, 1999

TERESA ANN GATES

Petitioner,

vs.

FORREST GENERAL HOSPITAL, VICKI FERNICOLA PEVSNER

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner, Teresa Gates, filed a complaint against Respondents, Forrest General Hospital and Vicki Pevsner, in Forrest County, Mississippi Circuit Court on May 7, 1997. Respondents removed the suit to federal court on June 2, 1997. Petitioner alleged in her suit that she was employed as the Education Coordinator at Pine Grove Recovery Center (a division of Forrest General) and was then "replaced" by a less qualified female under the age of 40. (R. pp. 6-7). Petitioner asserted that Forrest General and Vicki Pevsner willfully and/or negligently discriminated against her on the basis of her age, that her age was at least a contributing factor in her being terminated from the Education Coordinator position and that she was "compelled to perform in a part-time job." (R. p. 7, ¶7). Petitioner also alleged that she was "replaced" because she was a whistle-blower (R. p. 7, ¶8); was a victim of detrimental reliance, promissory estoppel, and/or equitable estoppel (R. pp. 7-8); had a contract that was breached by Respondents (R. p. 8, ¶10); and was the victim of intentional infliction of emotional distress. (R. p. 8, ¶11).

Petitioner filed an amended complaint on August 29, 1997, to add as an "alternative contention" that she was deprived of specific property interests and constitutional rights and/or privileges secured by the United States Constitution and the Mississippi Constitution. She also alleged that she was deprived of her liberty interests and that her First, Fifth and Fourteenth Amendment Rights were violated, all in violation of 42 U.S.C. §1983. (R. p. 59).

Pursuant to a motion for partial summary judgment filed by Forrest General and Vicki Pevsner on August 26, 1997, the District Court dismissed Petitioner's breach of contract claim, finding that Petitioner was employed at will under Mississippi law and, thus, had no breach of contract claim. The Court also

dismissed Petitioner's tort claims of negligence, detrimental reliance, promissory estoppel, equitable estoppel and intentional infliction of emotional distress and the whistle-blower claim because Petitioner failed to follow the proper notice procedures under Miss. Code Ann. §11-46-11(1). (R. pp. 86-92). Plaintiff subsequently refiled these latter claims in state court, and they are not the subject of her Petition for Writ of Certiorari.

The claims remaining before the district court were Petitioner's age discrimination claim, §1983 and constitutional claims and a constructive discharge claim. On February 4, 1998, Respondents filed a motion for summary judgment on these remaining claims.

On May 11, 1998, Magistrate Judge Louis Guirola, Jr.[1] issued a judgment, memorandum opinion and order granting Respondents' motion for summary judgment in its entirety. (R. pp. 359-382). On May 21, 1998, Petitioner filed a motion for reconsideration. (R. pp. 389-394). On June 23, 1998, Judge Guirola denied the motion. (R. pp. 402-403).

Petitioner filed a timely notice of appeal to the Fifth Circuit on July 15, 1998. (R. pp. 405-406). On September 24, 1999, the Fifth Circuit affirmed the decision of the lower court. (App. 1a-4a). Petitioner filed a request for a panel hearing and a rehearing *en banc* on October 8, 1999, which were denied by the Fifth Circuit on November 3, 1999. Petitioner subsequently filed this Petition for Writ of Certiorari.

As detailed below, there is no cause for this Court's review of Petitioner's contentions which now have been

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[1]Pursuant to 28 U.S.C. §636(c) and Fed. R. Civ. Proc. 73, the parties consented to proceed before the Magistrate Judge.

rejected by the District Court and by the Fifth Circuit. Petitioner misstates and mischaracterizes the lower courts' rulings in an attempt to create a legal issue worthy of certiorari review by this Court. The lower courts properly applied the law, therefore there is nothing for this Court to review.

A. Petitioner Misstates the Fifth Circuit Holding Regarding Her *Prima Facie* Case of Age Discrimination

In the Petition, Petitioner claims that the Fifth Circuit "conceded" that she established a *prima facie* case of age discrimination but, despite this fact, the court affirmed summary judgment for Respondents. Petitioner misstates the Fifth Circuit's holding. Petitioner's Age Discrimination in Employment Act (ADEA) claim is premised upon her alleged discharge from the Education Coordinator position and her failure to be selected for the Outreach Coordinator position at Forrest General. Petitioner claims that she was discharged in May 1996 from her position as Education Coordinator and that this discharge was based on her age. Not only did the Fifth Circuit not concede that Petitioner made out a *prima facie* case with regard to her discharge from this position, that court found this claim to be "without merit." (App. 2a).

Specifically, the Fifth Circuit found that the Petitioner's Education Coordinator position was eliminated and that only a small part of Petitioner's duties as Education Coordinator were assigned to another employee who was already performing the duties of the Therapy Coordinator. Therefore, Petitioner cannot be considered as having been replaced by another employee. *Barnes v. GenCorp., Inc.*, 896 F.2d 1457, 1465 (6th Cir.), *cert. denied*, 498 U.S. 878 (1990)

(person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties) (App. p. 2a).

The Fifth Circuit also addressed Petitioner's claim that she was not chosen for the position of Outreach Coordinator and that this decision was unlawfully based on her age. While it is true that the Fifth Circuit found that Petitioner produced enough evidence to establish a *prima facie* case with regard to this claim, the Fifth Circuit upheld the District Court's decision to grant summary judgment to Respondents because Petitioner failed to produce sufficient evidence to allow a reasonable jury to conclude that Respondents' legitimate nondiscriminatory reasons for the selection of another individual for the Outreach Coordinator position were mere pretext. (Appendix p. 2a-3a).

B. Petitioner Misstates the Fifth Circuit's Holding Regarding Her First Amendment Claim

Petitioner also claims that the Fifth Circuit conceded that her criticism of Hospital co-employees was "protected" speech. Again, Petitioner distorts the facts. What the Fifth Circuit actually stated was that it disagreed with the District Court that Petitioner's criticism of Hospital coemployees was "necessarily unprotected" because it had not been made publicly or to the news media. (emphasis added) (App. p. 3a - 4a).

Petitioner also fails to mention that the Fifth Circuit further emphasized that even if it were to assume that Petitioner's speech was protected, Petitioner also had the burden to prove that this "protected" speech caused the alleged retaliatory

employment decision about which she complained; Petitioner failed to meet this burden. (App. p. 4a). The "speech" occurred in 1994, but Petitioner's alleged constructive discharge took place in 1997. In between, Petitioner received "superlative" personnel evaluations and offers of employment within the Hospital in various capacities. (App. 4a). Therefore, the Fifth Circuit concluded that a reasonable trier of fact could not find a causal link between the "speech" and the constructive discharge. Even if the speech was protected, it was just too remote from the employment decisions which were the subject of Petitioner's complaint. (App. p. 4a).

C. Petitioner Relies on Evidence That Is Not Contained in the Record

In her Petition, Petitioner claims that she "offered evidence that she was specifically told by her immediate supervisor that the Hospital wanted 'someone younger at a lower salary to replace her.'" (Petition p. 5). First of all, the Fifth Circuit held that such evidence was not sufficient within the context of this case to create a reasonable inference that age was a determinative reason for the employment decision. More importantly, the Fifth Circuit properly rejected Petitioner's attempt to rely on those alleged statements because Petitioner never made it part of the summary judgment record in the District Court. (App. p. 3a). "Gates seeks to rely on her testimony quoted in her 'record excerpts' to show that Pevsner said she could 'hire a younger person for less money.' Gates' testimony to this effect, [h]owever, is not part of the summary judgment record." (App. 3a ftnt.2). Petitioner now seeks to use this same evidence to obtain a Writ of Certiorari. Like the Fifth Circuit below, this Court should reject this "evidence" because it is not part of the

record.

REASONS FOR DENYING THE WRIT

1. The Courts Below Properly Followed Supreme Court Precedent in Deciding Petitioner's Age Discrimination Claims.

Petitioner claims that she made a *prima facie* case of age discrimination and, because of that, she should be able to bypass a motion for summary judgment and take her case directly to a jury. Petitioner attempts to characterize the Fifth Circuit as taking a contrary position regarding summary judgment in age discrimination cases from the positions taken in the Second, Fourth, Seventh, Eighth, Tenth and Eleventh Circuits as well as the District of Columbia. (Petition pp. 6-7).

In analyzing Petitioner's age discrimination claims, the Fifth Circuit and District Court merely applied the burden-shifting analysis established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824 (1973) and later clarified in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1094 (1981) and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 525, 113 S.Ct. 2742, 2756 (1993). This analysis is properly applied when a plaintiff can produce no direct evidence of discrimination. The District Court found, and the Fifth Circuit affirmed its finding, that Petitioner presented no direct evidence of age discrimination. (App. 14a).

First, the plaintiff must establish a *prima facie* case of age discrimination. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824; *Bauer v. Albemarle Corp.*, 169 F.3d 962, 966 (5th Cir. 1999). This burden is not onerous and may be satisfied with only a minimal showing. *Burdine*, 450 U.S. at 253, 101 S.Ct. at 1094. If the plaintiff is able to establish a

prima facie case, this merely raises a presumption of discrimination, which the defendant must rebut with a legitimate nondiscriminatory reason for the challenged employment action. *Hicks*, 509 U.S. at 525, 113 S.Ct. at 2756; *Bauer*, 169 F.3d at 966. If the defendant articulates such a reason, the burden shifts back to the plaintiff who must prove by a preponderance of the evidence that the defendant's nondiscriminatory reason was a pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 802-804, 93 S.Ct. at 1824-1825; *Bauer*, 169 F.3d at 966. The plaintiff bears the burden of persuasion throughout the case. *Burdine*, 450 U.S. at 253, 101 S.Ct. at 1093.

The Courts below merely followed this Court's analysis in requiring Petitioner to prove that Respondents' nondiscriminatory reason was a pretext for discrimination. There is absolutely no precedent to support Petitioner's contention that once a plaintiff establishes a *prima facie* case she gets to skip over the rest of the analysis and go directly to a jury. The District Court and the Fifth Circuit properly found in favor of Respondents' motion for summary judgment because Petitioner failed to overcome her burden of proving that Respondents intentionally discriminated against her on the basis of her age.

This comports with long established precedent set by this Court and followed by all lower courts. Contrary to Petitioner's suggestion, there is no conflict among the lower courts regarding the fact that a *prima facie* case is but one step in the overall analysis of a discrimination claim. It is not, as Petitioner claims, the final step before proceeding to a trial before a jury.

2. The Fifth Circuit Properly Applied the Summary Judgment Standard, and There Is No Conflict Among the Circuits Regarding This Standard

Petitioner's claim that the burden to overcome a motion for summary judgment is "much heavier in the Fifth Circuit" is ludicrous. The standard for overcoming a motion for summary judgment in the Fifth Circuit is the same as in every other circuit, no more and no less. Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Boyd v. State Farm Ins. Companies*, 158 F.3d 326, 329 (5th Cir. 1998); *Calpetco 1981 v. Marshall Exploration, Inc.*, 989 F.2d 1412 (5th Cir. 1993) *cert. denied*, 119 S.Ct. 1357, 143 L.Ed. 518.

Such judgment is proper when the summary judgment record, viewed in the light most favorable to the nonmovant, establishes there is no material fact issue. *Dufrene v. Browning-Ferris, Inc.*, 207 F.3d 264, 266 (5th Cir. 2000); *Drake v. Advance Const. Serv. Inc.*, 117 F.3d 203, 204 (5th Cir. 1997). When the nonmoving party has the burden of proof at trial, the moving party need only alert the court that there is an absence of evidence in support of one or more elements to the plaintiff's claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Armstrong v. City of Dallas*, 997 F.2d 62 (5th Cir. 1993). Once the movant has made the proper showing, the nonmoving party has the burden to produce sworn evidence to rebut the motion. *Celotex*, 477 U.S. at 324; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Page v. Delaune*, 837 F.2d 233, 239 (5th Cir. 1988); *C.F. Dahlberg Co., Inc. v. Chevron U.S.A., Inc.*, 836 F.2d 915, 920 (5th Cir. 1988).

The Fifth Circuit applied the proper standard when it affirmed the District Court's granting of summary judgment. When Petitioner failed to overcome the *McDonnell Douglas* burden, the Courts below properly found that there was no genuine issue of material fact and Respondents were entitled to judgment as a matter of law.

CONCLUSION

Respondents respectfully request this Court to deny the Petition for the foregoing reasons.

Dated: May 30, 2000

Respectfully submitted,

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